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# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-574

CAROLINA POWER & LIGHT COMPANY
and FLOYD B. McKISSICK ENTERPRISES, INC.,

*Petitioners,*

v.

ELDRED MOORE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

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No. _____

CAROLINA POWER & LIGHT COMPANY and FLOYD B. McKISSICK ENTERPRISES, INC.,
Petitioners

vs.

ELDRED MOORE,
Respondent

---

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the above case on July 16, 1976.

## OPINIONS BELOW

The Opinion of the District Court for the Eastern District of North Carolina setting aside the verdict for plaintiff on the grounds that, as a matter of law, plaintiff was contributorily negligent and that such contributory negligence barred his recovery is printed in Appendix A hereto but it was not reported in the official reports. The Opinion of the Court of Appeals for the Fourth Circuit reversing the opinion of the District Court is printed in Appendix B hereto but it is not yet reported in the official reports.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 16, 1976 and a copy thereof is appended to this petition in Appendix B. The jurisdiction of this Court is under 28 U.S.C. 1254 (1).



## QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that plaintiff should not be found guilty of contributory negligence as a matter of law unless the evidence conclusively shows that he actually walked into the electrical wires because of his failure to see them.

2. Did the Court of Appeals err in holding that plaintiff could have reasonably assumed that the electrical wires were not dangerous.

3. Is the Opinion of the Court of Appeals for the Fourth Circuit in conflict with the decisions of other Circuit Courts of Appeals?

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED

There are no constitutional Provisions, Treaties, Statutes, Ordinances or Regulations involved in a determination of this petition.

STATEMENT OF FACTS

This is an action for personal injuries sustained by plaintiff on June 15, 1971. The accident occurred while plaintiff was on property owned by defendant Floyd B. McKissick Enterprises, Inc. The accident occurred when plaintiff came in contact with electric wires owned by defendant Carolina Power & Light Company.

At the close of the trial, The Honorable Franklin T. Dupree, Jr., United States District Court Judge, set aside a jury verdict for plaintiff on the grounds that, as a matter of law, plaintiff was contributorily negligent and that such contributory negligence barred his recovery. The United States Court of Appeals reversed.

In the spring of 1971, Plaintiff, a twenty-three year old urban planning honors student at Rutgers, applied for



a summer internship being sponsored by defendant Soul City Foundation, Inc. ("Foundation"). The internship was to last ten weeks and was to entail participation in the Foundation's development of a new town on property owned by defendant Floyd B. McKissick Enterprises, Inc. ("McKissick") to be known as "Soul City." Included in the program was physical labor.

Plaintiff's application was accepted by the Foundation, and, on June 13, 1971, shortly after his graduation from Rutgers University, Plaintiff arrived at Soul City to work under the auspices and direction of the Foundation in the internship program.

In the early afternoon of June 15, 1971, Plaintiff, while under the direction and supervision of James Moss, an employee of the Foundation, climbed onto the tin roof of a barn owned by McKissick

which was being converted into a dormitory by the Foundation at Foundation's expense. Within less than five minutes after Plaintiff climbed onto the roof of the barn he moved in a northerly direction along the length of the roof approximately 50 feet where he came into contact with a Carolina Power & Light Company ("CP&L") energized electric wire, and, as a result thereof, he was seriously injured. The energized wire was approximately 4 feet above the highest point of the roof and was one of two clearly visible wires (one over the other) which extended across the north end of the barn from east to west. Plaintiff had gone on the roof with Moss to repair damaged tin sections located at the northwest corner.

Plaintiff, on June 15, 1971, had lived and traveled in many parts of the United States, Africa and Europe.



Plaintiff was a good athlete. He played football, basketball and engaged in karate, attaining the level of "white belt." He had no fear of height and had a good sense of balance. His vision was 20-20 with glasses which had been obtained shortly before June 15, 1971, and which he was wearing at the time of his injury. His major fields of study had been in Psychology and City and Urban Planning. He admitted to the court that he knew what an electrical shock would do to him and that a high voltage line could be lethal. He had purchased on the day of his injury a three-prong electrical plug for an air conditioning unit. He told the court that the third prong on a three-prong electrical plug "is for grounding."

The wires were originally placed in position by CP&L sometime during March of 1955. The barn was originally constructed in 1965 under these wires. In 1969, the

barn was purchased by McKissick. During the summer of 1971, McKissick leased the barn to the Foundation for use in the development of Soul City.

The barn was a structure 58'8" in length (north to south), and 41' in width (east to west) with a tin shed 30' by 23' attached at the south end. The barn was two stories high with a tin roof. The ridge of the barn was 23' high and the eaves were 20'6" high. The roof had a slope of only 1 1/2" per foot. The two electric lines started across the roof from east to west at a point 10'6" south of the northeast corner. The lines crossed the ridge of the roof at a point 5'8" south of the north end of the ridge of the roof. The lines left the west side of the roof at the northwest corner. The pole to which these lines ran was 8'6" west of the northwest corner of the roof. The top line had 13,200 volts of



electricity; the bottom was neutral. Both wires were approximately one-half inch in diameter composed of seven conductors of aluminum wire, steel reinforced through the center, of a type commonly used in rural areas throughout North Carolina. The pole to which these lines ran was 8'6" west of the northwest corner of the roof. Attached to that power pole were:

(1) two electrical lines that dead-ended at this pole and which came from another pole 332'6" to the east;

(2) three service drops servicing
   (a) an area light across the road to the west,
   (b) the Foundation and McKissick offices across the road to the north, and
   (c) the barn itself 8 feet 6 inches to the east;

(3) an insulator;

(4) a transformer;

(5) a guy wire.

During the approximately 47 hours that plaintiff was at Soul City or in its vicinity he was in close proximity to the barn on at least nine occasions. He attended meetings near the barn, slept near the barn, cut grass and broke brick around the barn, and passed the barn every time he went to the plantation house or to town.

Upon plaintiff's return from Henderson on the day of the injury, he was instructed to take the siding off the shed, which was loose. When the siding was loosened, plaintiff stated "someone had noticed that the siding on



the roof was loose and someone had brought attention to the sidings on the roof that were loose and you could see parts of... just edging up and we decided to put the ladders up against the shed and go up on the roof." "...(H)e pulled his truck up, put the ladder on and we went right up on the roof on the shed." Moss testified that before they went up on the roof he had a meeting with the students and told them that they couldn't go up on the roof unless they had rubber shoes; that there was a wire up there that was hot, that it had 5 to 10 thousand volts in it, that following this meeting, he backed his truck so he could get the ladder from the truck up to the shed. Plaintiff Moore went up this ladder first.

At this point, plaintiff testified, "I recall starting up over the shed and I know in order to climb the next roof we needed another ladder and they were

in the process of bringing another ladder up, I don't know whether it was the one that was on the bed of the truck or the longer ladder and the next thing I know was I just started going up the ladder and that was it. That's the last thing I remember."

Moss immediately followed plaintiff up the ladder. When Moss reached the top of the ladder, he could see the electrical wires at the north end of the barns. He saw plaintiff walking on the ridge of the roof towards the north end of the barn and the wires. At that time, plaintiff had walked approximately one-half the length of the barn. Moss then started hammering nails on the tin sections of the roof and he did not hear any noise or sound from plaintiff, nor did he see plaintiff again until he noticed the wires move. At no time did plaintiff ask Moss whether or not the wires were ener-



gized or "hot." When Moss noticed the wires move, he looked up and saw plaintiff lying face down across the wires with his head pointed to the north. Plaintiff was lying approximately 30 inches to the west of the ridge of the roof. At that point on the roof prior to plaintiff's contact with the energized wire, the wire was approximately 5 feet above the roof.

The burns which Moss saw after he got plaintiff off the wires were on plaintiff's stomach where his clothes had burned. There were no burns on his face or hands.

The weather was clear and the roof of the barn was dry when plaintiff came into contact with the energized electrical wire.

## REASONS FOR GRANTING THE WRIT

A. The Court of Appeals erroneously held that plaintiff should not be found guilty of contributory negligence as a matter of law unless the evidence conclusively shows that he actually walked into the electrical wires because of his failure to see them.

According to the Court of Appeals:

> "The Defendants' theory of the case is that Moore walked into the wires because he did not see them. They say that failure to keep a proper lookout is negligence as a matter of law. It is, however, just as plausible to infer that Moore tried to stay safely away from the wires but remained close enough to do his work, and that he slipped on the slanted tin roof and fell over them."

Although defendants do contend that the evidence in this case conclusively shows that plaintiff walked into the wires because of his failure to see them, that contention represents only one aspect of defendants' theory as to why plaintiff



should be found guilty of contributory negligence as a matter of law. An alternative contention as to why plaintiff should be found guilty of contributory negligence as a matter of law is that he got so close to the wires while working on the roof of the barn that he inadvertently came into contact with them due to some careless, heedless or inattentive movement on his part.

The Court of Appeals completely ignored this alternative contention as to why plaintiff should be found guilty of contributory negligence as a matter of law. In fact, it even suggested that plaintiff could not be found guilty of contributory negligence as a matter of law if he merely slipped and fell onto the wires while working on the roof of the barn. By ignoring this alternative contention and suggesting that plaintiff could not be found guilty of contributory

negligence as a matter of law if he merely slipped and fell onto the wires while working on the roof of the barn, the Court of Appeals implicitly held that plaintiff should not be found guilty of contributory negligence as a matter of law unless the evidence conclusively shows that he actually walked into the wires because of his failure to see them.

It is respectfully submitted that the decision of the Court of Appeals is erroneous and in complete conflict with the law of North Carolina and the law of most of the other jurisdictions insofar as it holds that plaintiff should not be found guilty of contributory negligence as a matter of law unless the evidence conclusively shows that he actually walked into the wires because of his failure to see them.

It is well settled in North Carolina and most of the other jurisdictions that



a person is guilty of contributory negligence as a matter of law if he comes into contact with an energized electrical wire because of his failure to maintain a proper lookout and/or his failure to exercise the degree of care for his own safety which was required under the circumstances, such as maintaining a proper distance from the wire. It is immaterial whether the person actually walked into the wire because of his failure to see it or whether he inadvertently came into contact with the wire due to some careless, heedless or inattentive movement on his part. In fact, in most of the cases the contacts with energized electrical wires have come as a result of some inadvertent movement on the part of the persons who came into contact with the wires.

In Floyd vs. Nash, 268 NC 547, 151 SE2d 1 (1966), the plaintiff's intestate was electrocuted when, for some unknown

reason, a blower pipe attached to a feed truck, the contents of which he was about to discharge through the pipe into a storage tank, inadvertently came into contact with an insulated power line about three feet above the top of the tank. The power line was clearly visible and the plaintiff's intestate was aware of its presence. The plaintiff instituted a civil action against the owner of the premises and the power company, alleging that the owner of the premises was negligent in constructing the storage tank directly beneath the power line and that the power company was negligent in permitting the power line to remain directly above the storage tank. At the conclusion of the plaintiff's evidence, a judgment of nonsuit was entered in favor of each of the defendants. The North Carolina Supreme Court affirmed both judgments of nonsuit, by holding as follows:



"Even if negligence by either of these Defendants could reasonably be inferred upon the evidence in this record, the evidence leads inescapably to the conclusion that the deceased was guilty of contributory negligence. Knowing of the presence of the power line, and having filled this tank on many previous occasions, the deceased, for some unknown reason, permitted the metal blower pipe to rise far higher than necessary and to come in contact with the power line. This tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased. (Emphasis added.)

"The deceased was not a child, and there is nothing to indicate that he did not have normal experience and intelligence. Under these circumstances, the fact that he was not specifically educated or trained in the use and dangers of electricity does not absolve him from the duty to use the care which a man of ordinary prudence would use in maneuvering a metal pipe in the vicinity of an electric power line. In spite of the deceased's lack of training in the handling of electricity, we think that the evidence leads inescapably to the conclusion that he failed to use the care of a reasonable man, knowing what he knew concerning the presence of the power line, and that his failure to do so was a contributing cause of his death." (Emphasis added.)

In Bogle vs. Power Company, 27 NC App 318, 219 SE2d 308 (1975; Cert. Denied. 289 NC 296), the plaintiff's intestate was called to the Glen Alpine Grammar School to check for leaks in the roof and to clean out some guttering. In the course of his work, he used a 28-foot aluminum extension ladder to gain access to the roof of the school building. He was also advised of the presence of a power line located approximately twenty-one feet from the building, suspended from a pole at a height of twenty-two feet. When he finished his work on the roof, he attempted to remove the ladder. As he pulled the ladder away from the building, he lost control of it and it inadvertently fell against the power line, electrocuting him. The plaintiff instituted a civil action against the power company, alleging that it failed to exercise due care toward her intestate by continuing



to utilize a power line situated in such close proximity to the school building when it knew, or should have known, that said power line presented a hazard to maintenance men working in and around the school building. The power company moved for summary judgment in its favor on the theory that the plaintiff's intestate was guilty of contributory negligence as a matter of law in attempting by himself to remove the ladder from the building. The power company's motion for summary judgment was allowed by the trial court, and, on appeal, it was affirmed by the North Carolina Court of Appeals. According to the North Carolina Court of Appeals:

> "We think summary judgment was proper because of intestate's contributory negligence. The materials presented at the hearing established that intestate, in attempting by himself to remove the ladder from the building after being warned of the power line, and attempting to remove the ladder from the line,

> failed to use ordinary care for his own safety and that such want of due care was at least one of the proximate causes of his death. The law imposes upon a person sui juris the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided." (Emphasis added.)

In Baker vs. Lumberton, 239 NC 401, 79 SE2d 886 (1954), the plaintiff's intestate was electrocuted when he came into contact with an electric wire which had fallen into his back yard. The evidence indicated that the plaintiff's intestate saw the wire lying in his back yard, that he was warned that the wire was "hot", that he nevertheless walked toward the wire, that he stopped some five feet from the wire, and that the wire suddenly moved and came into contact with him. The North Carolina Supreme Court held that the defendant was entitled to a judgment of nonsuit. According to the North Carolina Supreme Court:



> "If it be conceded that the City of Lumberton were negligent in any of the respects alleged in the Complaint, it affirmatively appears from the evidence offered by plaintiff that the intestate of Plaintiff was negligent in approaching the wire--when he saw, and was warned, that it had become alive with electricity--thereby he contributed proximately to his injury and death. The law imposes upon a person sui juris the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided." (Emphasis added.)

In Le Vonas vs. Acme Paperboard Company, 184 Md 16, 40 A2d 43 (1944), the plaintiff was injured when the boom on the crane which he was operating inadvertently came into contact with an energized electrical wire. The plaintiff instituted a civil action against the owner of the premises on which he was working when he came into contact with the wire. The plaintiff alleged that the owner was negligent in failing to warn him of the fact that the wire was energized and dangerous. The trial court

entered a directed verdict in favor of the defendant and the Court of Appeals of Maryland affirmed the directed verdict by holding as follows:

> "When a person voluntarily touches, or approaching nearer than a reasonably prudent person would, an electric wire, which he knows, or which a person of ordinary knowledge and experience would have reason to believe, is sufficiently charged with electricity to be dangerous, and in consequence thereof he is injured, it will be assumed as a matter of law that his own negligence contributed to the accident." (Emphasis added.)

In Lorence vs. Omaha Public Power District, 191 Neb. 68, 214 NW2d 238 (1974), the plaintiff, while working on a billboard sign, attempted to haul a 20-foot ladder up to his position on a crossmember. As he attempted to haul the ladder into that position, the top of the ladder inadvertently came into contact with an energized electrical wire which was some eight to nine feet from him. The trial court entered a judgment in favor of the



plaintiff. On appeal, the Supreme Court of Nebraska reversed the trial court's judgment for the plaintiff by holding that the plaintiff was guilty of contributory negligence as a matter of law, thus barring any recovery on his part. According to the Supreme Court of Nebraska:

> "The plaintiff clearly placed himself in a position of danger within close proximity to open and obvious power lines when he knew or should have known that substantial injury was likely to result from his activities in the manner by which he performed them. The only inference which can be reasonably drawn from the evidence is that the Plaintiff was contributorily negligent as a matter of law." (Emphasis added.)

In Southern Maryland Electric Cooperative vs. Blanchard, 239 Md 481, 212 A2d 301 (1965), the plaintiff sustained injuries when a television antenna which he was attempting to install on a trailer inadvertently came into contact with an energized electrical wire which extended over the trailer. The plaintiff claimed

that he was unaware of the presence of the wire. The Court of Appeals of Maryland held that the plaintiff was guilty of contributory negligence as a matter of law. According to the Court of Appeals of Maryland:

> "Irrespective of whether Plaintiff had actual knowledge of the presence of the wire, the law, under the circumstances here involved, charged him with such knowledge. It is a fundamental principle of negligence law that a person must use his Providence-given senses to avoid injury to himself. This has been recognized since time immemorial. This contributory negligence as a matter of law arises from the failure of Plaintiff to use due care to avoid dangers which he knows exist, or because the dangers are so obvious that any ordinarily prudent man would see them and guard against them. He must use reasonable care in examining his surroundings to observe and take such knowledge of danger as can be attained by observation. In performing the duties of his place, he is bound to take notice of the ordinary operations of familiar laws, and to govern himself accordingly. If he fails to do so, the risk is his own. It is clear to us that the facts of this case not only justify a ruling that Plaintiff was negligent as a matter of law, but compel it."



Numerous other decisions have held that a person is guilty of contributory negligence as a matter of law if he gets so close to an energized electrical wire that he inadvertently comes into contact with the wire due to some careless, heedless or inattentive movement on his part. See: Hamilton vs. LaClede Electric Cooperative, 294 SW2d 11 (Mo. 1956); Rank vs. Metropolitan Edison Company, 370 Pa. 107, 87 A2d 198 (1952); Peterson vs. Minnesota Power and Light Company, 288 NW 588 (Minn. 1939); Craft vs. Fordson Coal Company, 114 W. Va. 295, 171 SE 886 (1933); Arkansas Power and Light Company vs. Hubbard, 181 Ark. 886, 28 SW2d 710 (1955).

Thus, it seems clear that it is not essential for the evidence in this case to conclusively show that plaintiff actually walked into the wires because of his failure to see them in order for

plaintiff to be found guilty of contributory negligence as a matter of law--as held by the Court of Appeals. Although such evidence would certainly justify and compel a finding that plaintiff was guilty of contributory negligence as a matter of law, the authorities cited herein make it equally clear that plaintiff should also be found guilty of contributory negligence as a matter of law if the evidence in this case conclusively shows that he got so close to the wires that he inadvertently came into contact with them due to some careless, heedless or inattentive movement on his part, such as slipping and falling onto them while working on the roof of the barn.

It is respectfully submitted that the evidence in this case does conclusively show that plaintiff walked into the wires because of his failure to see them. However, if it should be determined



that the evidence in this case does not conclusively show that plaintiff walked into the wires because of his failure to see them, then it is respectfully submitted that the evidence in this case, at the very least, conclusively shows that plaintiff got so close to the wires while he was working on the roof of the barn that he inadvertently came into contact with them due to some careless, heedless or inattentive movement on his part. In either event, whether plaintiff actually walked into the wires because of his failure to see them or whether he inadvertently came into contact with them due to some careless, heedless or inattentive movement on his part, it is well settled that he should and must be found guilty of contributory negligence as a matter of law.

B. The Court of Appeals erroneously held that plaintiff could have reasonably

assumed that the electrical wires were not dangerous.

As an alternative explanation for its decision as to why plaintiff should not be found guilty of contributory negligence as a matter of law, the Court of Appeals held as follows:

> "Or the jury might have decided that Moore reasonably assumed that the wires were not dangerous, because he testified that he did not recall being told that they were live." (Emphasis added.)

Not only is such an "assumption" that the wires were not dangerous completely inconsistent with the law of North Carolina and most of the other jurisdictions, it is also inconsistent with common sense and practical human experience.

"The law imposes upon a person sui juris the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided." Rosser vs. Smith, 260 NC 647, 113 SE2d 499 (1963);



Mintz vs. Murphy, 235 NC 304, 69 SE2d 849 (1952); Basden vs. Sutton, 7 NC App 6, 171 SE2d 77 (1969).

It is well settled that an integral part of the doctrine of "self-protection" is the duty to avoid coming into contact with electric wires:

> "Contact with such wires should be avoided when their existence is known. Where a person seeing such a wire knows that it is, or may be, highly dangerous, it is his duty to avoid coming into contact therewith, rather than to accept its presence as an invitation to make such contact. Any person mindful of his safety should treat an electric wire with caution." 26 Am Jur 2d, Electricity, §94 (1966) (Emphasis added.)

> "An ordinary person is held to know the danger attending contact with electric wires, and if he heedlessly brings himself into contact with such wire, and is injured in consequence, his contributory negligence will prevent recovery." 29 CJS, Electricity, §53 (1965)

North Carolina specifically extended the "self-protection" principle to the hazard of contacting electric wires in

Alford vs. Washington, 244 NC 132, 92 SE2d 788 (1956). In that case, the North Carolina Supreme Court held as follows: "Where a person seeing an electrical wire knows that it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith." (Emphasis added.)

In Rank vs. Metropolitan Edison Company, supra, the Supreme Court of Pennsylvania held that "...the ordinary person is held to know that danger attends contact with electric wires, and it is his duty to avoid them so far as he may." (Emphasis added.)

In Peterson vs. Minnesota Power and Light Company, supra, the plainiff's intestate, Gustaf, an intelligent youth of eighteen years, was electrocuted when he cut a tree which struck an energized electrical wire as it fell to the ground. According to the Supreme Court of Minnesota:



"The danger of electrical energy is a matter of common knowledge. Children of early age are aware of its deadly potentialities and realize that care must be exercised, although the latter may not always be the course of conduct pursued. Judicial notice can be taken of the fact that it is generally known by people of even less education than Gustaf that danger lurks in electric wires, especially to those unlearned in its properties. All persons are held by law to a certain minimum knowledge common to the community.

"Gustaf must be deemed to have appreciated, as a reasonable man in his community would have, that the wires were objects of danger to him and also that contact with them was likely to produce injury or death."

Even if, as contended by plaintiff, he was not told that the wires were live and dangerous, he certainly had enough knowledge and information to suggest to him that they might be live and dangerous. He knew that there was electricity at Soul City. He knew that it was possible to receive a fatal or lethal shock by coming into contact with a high voltage electrical line. Finally, the wires

themselves were hanging in the air approximately twenty feet from the ground, a fact which, in and of itself, should have been sufficient to suggest to plaintiff that they might be live and dangerous.

Thus, it is clear that plaintiff had no right to assume that the wires were not dangerous. To the contrary, he was required to assume, at the very least, that the wires might be live and dangerous. Furthermore, it is undisputed that if plaintiff had asked or inquired as to whether or not the wires were live and dangerous he would have been told that they were in fact live and dangerous.

C. The decision of the Court of Appeals is in conflict with the decisions of the United States Second Circuit Court of Appeals.

The United States Court of Appeals for the Second Circuit, in Stoffell vs. New York N. H. and H. R. Company,



205 F 2d 411 (1953), held that the plaintiff in that case was guilty of contributory negligence as a matter of law because of his failure to ask or inquire as to whether or not a wire which he would be working underneath was an energized electrical wire before he started working underneath it. The plaintiff was injured when he came into contact with the wire while working underneath it in the defendant's railroad yard. The plaintiff, who was six feet, two inches tall, was on top of a crate of machinery assisting in the removal of a tarpaulin when he came into contact with the wire, which was less than six feet above the crate. Although the plaintiff knew that the wire was above him, he did not know if it were energized. Furthermore, he failed to ask or inquire as to whether or not it were energized. The Second Circuit Court of Appeals reversed a judg-

ment for the plaintiff and remanded the case to the trial court with directions to enter judgment for the defendant.

The Court reasoned as follows:

> "The failure of the Plaintiff to take an elementary precaution for his own safety by inquiring whether the wire was de-energized before starting to work near it was in our opinion contributory negligence as a matter of law. We think it just as unreasonable to come into dangerous proximity to a high tension wire without bothering to inquire whether it is alive as it is to proceed in a strange unlighted place without investigating the possible dangers." (Emphasis added.)

A similar result was reached in Macchiarella vs. United States, 95 F Supp. 149 (E. D. Fla. 1957), where the plaintiff's intestate was electrocuted when he came into contact with an energized electrical wire hanging above him. As in the Stoffell case, the plaintiff's intestate had failed to ask or inquire as to whether or not the wire was energized prior to placing himself in a position near it. The Court found that the plaintiff's intestate was guilty of contributory negligence as a matter of law "...in his failure to make inquiry concerning the readily visible and visibly apparent uninsulated wires; and that such negligence was at least one of the proximate causes of his death."



Plaintiff failed to ask anyone, at any time, whether or not the wires extending across the roof of the barn were live and dangerous. The significance of this failure on his part, from the standpoint of showing contributory negligence, lies in the undisputed fact that plaintiff went onto the roof of the barn in order to repair its damaged tin sections. Most of the damaged tin sections on the roof were located in the northwest corner of the roof, directly underneath the wires. Although plaintiff knew that he would be repairing damaged tin sections of the roof in close proximity to the wires,

he failed to ask anyone whether or not the wires were live and dangerous. Furthermore, since plaintiff was on the roof for almost five minutes before he came into contact with the wires, he had more than ample opportunity to ask or inquire as to whether or not the wires were live and dangerous.

It is respectfully submitted that plaintiff's failure to ask or inquire as to whether or not the wires were live and dangerous before he placed himself in a position near them constituted contributory negligence as a matter of law. It is further submitted that the decision of the Court of Appeals, insofar as it failed to find that plaintiff was guilty of contributory negligence as a matter of law for failing to ask or inquire as to whether or not the wires were live and dangerous before placing himself in a position near them, is erroneous and



in conflict with the decision of the United States Court of Appeals for the Second Circuit in Stoffell vs. New York N. H. and H. R. Company, supra.

## CONCLUSION

For the reasons stated herein, the Petitioners pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in order to review the judgment of that Court in this case.

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APPENDIX A
(Opinion of the District Court for
the Eastern District of North Carolina)

The trial of this diversity personal injury action before a jury at the June 9, 1975 session of the court at Raleigh resulted in a verdict in plaintiff's favor establishing the negligence of each of the three defendants, plaintiff's freedom from contributory negligence and assessing damages in the amount of $175,000.00. The case is now before the court on the motions of the defendants under Rule 50(b) for judgment notwithstanding the verdict and in the alternative for a new trial. The plaintiff has not responded to the motions and the time for response under Local Rule 4F has expired. Each of the parties filed a trial brief, but no briefs have been filed by any party addressed to the motions now under consideration. Neither party

has requested a hearing on the motions as required by the Local Rules, and therefore no hearing has been held.

The accident which gave rise to this action occurred at a federally-funded project which has been under construction in Warren County, North Carolina, for several years. It involves the establishment of an entirely new town to be known as "Soul City" on property which was formerly open-country farmland. The land is owned by the defendant, Floyd B. McKissick Enterprises, Inc., and development of the new municipality is being carried on by the defendant, Soul City Foundation, Inc. The facts surrounding the accident necessary to be considered in connection with the motion for judgment n.o.v. are largely undisputed and have been accurately set forth in the trial brief of the defendant, Carolina Power & Light Company (CP&L) as follows:



"The plaintiff, a 23-year-old college graduate, arrived at 'Soul City' on Sunday evening, June 13, 1971. He had agreed to work and train at Soul City under the auspices of Soul City Foundation, Inc., for a 10-week period, for which he was to receive room and board and $800.00. The accident resulting in his injuries occurred at approximately 2:00 p.m. on June 15, 1971. The plaintiff was injured when he contacted electric lines owned by CP&L while working for and under the direction of defendant Soul City Foundation, Inc., on the tin roof of a barn owned by defendant Floyd B. McKissick Enterprises, Inc. The wires had been strung many years prior to the construction of the barn under the wires in 1965 by the predecessor in title to Floyd McKissick Enterprises, Inc.

"During his stay at Soul City, the plaintiff was in close proximity to the barn on numerous occasions. The barn was a structure 58'8" by 41' with a tin shed 31'7" by 22'4" attached at the south end. The exact height of the barn is unknown, but the structure contained two stories with a tin roof slanting upwards on both sides to a peak or comb along the center of the roof. 8'6" west of the northwest corner of the barn stood a power pole owned by defendant CP&L. Attached to the pole were two guy wires; three service drops serving an area light across the road to the west, the Soul City and McKissick offices across the road to the north, and the barn itself

8'6" to the east; two distribution wires that deadended at this pole and led from another pole 283' to the east; an insulator; and a transformer. The service to the barn led to a metal conduit and then to a meter attached to the north side of the barn at the northwest corner.

"The distribution lines from the pole to the east crossed over the top of the barn at an angle near the north end. The two lines (one over top of the other) crossed the east side of the roof 10'6" from the north end, the comb or peak 5'8" from the north end and over the northwest corner of the barn before attaching to the power pole 8'6" to the west of that corner. The top primary line carrying 13,200 volts was 4'2" above the peak or comb of the roof. The lower neutral line which was not energized was 8" above the peak.

"The tin roof at the northwest corner of the barn had been twisted up and off of the roof and the repair of this area was the reason the plaintiff was on the roof. There were no trees or other obstructions near the barn and the electric lines, power poles and other electric facilities were clearly visible both from the ground and from the roof of the barn. Just prior to the accident, the plaintiff climbed up on the south end of the roof by means of a ladder on the tin shed. Mr. Moss (who had been employed by Soul City Foundation, Inc., to supervise and assist in the renovation and repair of the



barn) immediately followed him up. The plaintiff then walked down the length of the roof towards the north end of the barn and the wires. There are no eye witnesses presently available to the actual contact and the plaintiff cannot recall any of its actions from the time he was climbing up to the roof until after he had been removed from the roof after the accident. The plaintiff contacted the wires and when he did so they moved. The movement caught the attention of Mr. Moss who immediately looked and saw the plaintiff lying across the wire face down with his head and upper torso to the north of the wires and his feet and lower torso to the south. The contact point on the wires was 30" to the west of the comb of the roof. At the point of contact the energized wire was 5 feet above the roof. The plaintiff was removed from the roof and taken to Duke Hospital in Durham. The burns to the plaintiff were principally on the right armpit, right side and chest area, across the upper abdomen just above the belt line and the leg and foot. There were no burns on his back, hands or lower arms."

In addition to the foregoing the evidence also establish beyond question that the plaintiff is approximately 5'9" in height; that his vision is corrected to 20-20 by glasses which he was wearing at the time of the accident; that he had

no trouble with his vision at the time; that the weather was fair and there was nothing to obstruct the plaintiff's view of the electric wires as he approached and came in contact with them; that the energized wire that caused the damage was approximately one-half inch in diameter and was made of woven strands of smaller gauge aluminum wire; that the plaintiff was wearing crepe-soled shoes at the time; and that he had no physical impairments of any kind prior to the accident.

With respect to his injuries, the plaintiff sustained severe burns over about forty per cent of his body with the heaviest concentration of the burns being in the area of the chest and upper extremities. The plaintiff's right leg was so badly burned that it had to be amputated between the ankle and knee, but the left leg, although severely burned,



was able to be saved. Plaintiff was confined to Duke Hospital for treatment of his injuries and extensive skin-grafting for a period of several months, and his hospital and medical bills have been in excess of $16,000.00. Plaintiff's torso remains horribly scarred and mutilated, but fortunately his clothing serves to conceal most of the disfigurement resulting from the burns. Even so, plaintiff has to apply ointments to the affected areas and he continues to suffer pain and discomfort from his injuries. Despite his injuries and disabilities the plaintiff has been able to secure and maintain gainful employment, and loss of earnings is not a factor in the case.

The court is of opinion that there was evidence from which the jury could find that each of the defendants was guilty of negligence proximately causing the plaintiff's injuries. Although the

barn was erected underneath the electric wires after they had been installed, thus creating the hazard, the electrical code required CP&L to maintain a much greater clearance between the wires and the roof of the barn than the 50 inches which separated them on the day in question, and there was ample evidence from which the jury could find that the Power Company knew, or should have known, of the hazardous condition caused by the erection of the barn and yet it continued to maintain the lines in this position with such knowledge. As to the defendants, McKissick Enterprises and Soul City Foundation, each owed the plaintiff the duty of warning him of the danger, having the power cut off while the work was in progress and/or providing the plaintiff with a safe place to work. The motion for judgment n.o.v. as grounded on the failure of the plaintiff's proof to show



actionable negligence on each of the defendants must be denied.

The real battle at the trial and now in defendants' motions has waged around the issue of contributory negligence. From the beginning defendants have stressfully contended that all of the evidence points unerringly to plaintiff's failure to keep a proper lookout and exercise due care for his own safety as one of the proximate causes of his unfortunate injury which under controlling North Carolina law should bar recovery. Fully aware that such result should follow "when, and only when, the undisputed evidence taken in the light most favorable to the plaintiff establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom," Dennis v. Albemarle, 243 N.C. 221, 223, 90 S.E.2d 532 (1955), the court is constrained to agree.

Although cases involving electrical injuries are almost as numerous as the "autumnal leaves that strew the brooks in Vallambrosa",[1] diligent search has failed to reveal a case factually indistinguishable from the one at bar.[2]

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1. Milton's Paradise Lost, Book I, Line 302. The simile was first employed in this manner by Justice (later Senator) Ervin in reference to automobile accident cases in Penn Dixie Lines, Inc., v. Grannick, 238 N.C. 552, 555, 78 S.E.2d 410 (1953).

2. Floyd v. Nash, 268 N.C. 547, 151 S.E.2d 1 (1967), cited and relied on by defendants, is somewhat similar, but is distinguishable in that the plaintiff in that case knew of the presence of the wires overhead and the fact that they carried electricity. Plaintiff here disclaims any such knowledge and for present purposes this contention is accepted as true. However, much of what is said in the case is appropriate here. See the concluding paragraphs of the opinion, 268 N.C. at page 551.



Here we have a twenty-three-year-old intelligent and sophisticated college graduate who had lived and worked abroad[3] who, for reasons which apparently will never be known, walked fifty feet directly toward and into contact with a large uninsulated high-tension power line which connected with an electrical transformer mounted on a pole located not more than thirty feet to the left of his direct line of sight and to which other electric lines were connected. All of this was in plaintiff's plain and unobstructed view. There is no evidence that his attention was momentarily and involuntarily averted as was the case in Dennis v. Albemarle, supra, or that the scene presented an optical illusion as in Mulford v. Hotel

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3. Plaintiff is presently employed as a communications correspondent in the Stock and Bond Division of American Telephone and Telegraph Company.

Company, 213 N.C. 603, 197 S.E. 169 (1938).[4]

While the plaintiff contends that he was not warned by the defendants about the wires and was not aware that they carried electricity, a fact which would seem to have suggested itself even to a young schoolboy,[5] just why he happened to come in contact with the wires, whether energized or not, remains unexplained. If the wires had been de-energized and plaintiff had simply fallen and hurt himself after coming in contact with them,

4. Moreover, in North Carolina a defendant is not under a duty to guard against an "optical illusion" where its basis is a situation existing outside a building in full daylight. Garner v. Greyhound Corporation, 250 N.C. 151, 160, 108 S.E.2d 461 (1959).

5. The witness Moss testified that he had informed plaintiff's fellow student workers of the high-tension wires and of the necessity for wearing hard hats and rubber-soled shoes while working on the tin roof of the barn, but he could not be positive that plaintiff was in this group of students at the time he gave these warnings.



it is difficult to envision a North Carolina court allowing a recovery.

For want of more factually apposite cases involving electricity we have turned to cases in other areas of North Carolina tort law for guidance. Cases involving premises liability, for example, have been found instructive. In these cases plaintiffs who have been injured upon proceeding into a place of danger without keeping a lookout commensurate with the surrounding circumstances have routinely been held guilty of contributory negligence as a matter of law. Waldrup v. Carver, 240 N.C. 649, 83 S.E.2d 663 (1954);[6]

6. The concluding paragraph of the opinion by Chief Justice Barnhill in this case reads:

> "The mishap was unfortunate. That plaintiff has had to suffer the ill effects of his injuries is to be regretted. Yet he cannot hold these defendants to a higher degree of care for his safety than he exercised in his own behalf. The negligence, if any, of defendants was

Clark vs. Cleveland Drug Company, 204 N.C. 628, 169 S.E. 217 (1933); Scott v. Western Union Telegraph Company, 198 N.C. 795, 153 S.E. 413 (1930); see Little v. Wilson Oil Corporation, 249 N.C. 773, 107 S.E.2d 729 (1959).

The motor vehicle cases are to like effect. Warren v. Lewis, 273 N.C. 457, 160 S.E.2d 305 (1968); Rosser v. Smith, 260 N.C. 647, 133 S.E.2d 499 (1963). And suits against municipalities seeking damages for injuries sustained by reason of defective sidewalks have frequently failed where it was shown that the accident occurred in broad daylight and the defect complained of was obvious to anyone who

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Footnote 6. (continued)

> passive; that of plaintiff was active. The defendants permitted a condition to exist which made it possible for plaintiff to create the hazard which caused his injuries, but he, by his own conduct, created the hazard. He must suffer the consequences."



saw or in the exercise of reasonable care should have seen the danger. Welling v. Charlotte, 241 N.C. 312, 85 S.E.2d 379 (1955); Burns v. Charlotte, 210 N.C. 48, 185 S.E. 443 (1936). Where such suit was brought against the adjoining property owner responsible for the defect in the sidewalk the result was the same. Hedrick v. Akers, 244 N.C. 274, 93 S.E.2d 160 (1956).[7]

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7. "The conclusion seems inescapable that the plaintiff in this case did not see what she should have seen. 'In its present state, the law is not able to protect those who have eyes and will not see.' ...'A person travelling on a street is required in the exercise of due care to use his faculties to discover and avoid defects and obstructions, the care being commensurate with the danger or the appearance thereof.' Welling v. Charlotte, 241 N.C. 312, 85 S.E.2d 379. In the Welling case, the plaintiff was injured by stepping in a hole in the sidewalk 4 1/2 x 4 1/2 inches square and 1 inch or slightly more in depth. This court held that motion for nonsuit should have been allowed upon the ground of contributory negligence... 'He is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a

At the trial the plaintiff advanced the argument in opposition to the defendants' motions for a directed verdict that since the plaintiff is unable because of loss of memory caused by the accident to testify concerning his actual contact with the wires, it should be presumed that he used due care. Such a rule has been recognized in North Carolina, but the presumption thus created cannot stand in the face of actual evidence as to what occurred.

> "When a person survives an accident but is unable to testify concerning the events leading to the acci-

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Footnote 7. (continued)

defect which is visible and obvious.'...

"...In this case, the steel pipe was 10 inches in diameter, 8 feet long, and elevated from 2 inches to 5 inches above the concrete. The plaintiff should have seen it. Negligence on her part appears as a matter of law. Recovery is denied where contributory negligence is one of the proximate and participating causes of the injury." Id. p. 276.



> dent, by reason of the loss of memory resulting from injuries he sustained in the accident, it will be presumed, in the absence of evidence to the contrary, that he exercised due care. Annot., 141 A.L.R. 872. The defendants seek to invoke this rule and assert that the court's charge in respect thereto deprives them of the benefit thereof. In this we cannot concur.
>
> "Presumptions of this type are created to fill a complete hiatus in the testimony. They are 'bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' ...If there is any evidence to the contrary, the presumption fades out of the picture. It cannot be accorded evidential value or probative force, or be weighed against the evidence offered." Yost v. Hall, 233 N.C. 463, 468-9, 64 S.E.2d 554 (1951).

Here the plaintiff is unable to explain why he came in contact with the wires, but obviously he did so. Just seconds before, the witness Moss saw plaintiff walking toward the wires and his attention was again attracted by the movement of the wires. Plaintiff's burns were on the front of his body, and the inference is unmistakable that he walked

straight into the wires without stopping. Any presumption that plaintiff used due care under these circumstances is clearly rebutted.

The conclusion is that plaintiff's verdict cannot stand and judgment must be entered for the defendants notwithstanding the verdict. In conformity with Rule 50(c), however, the court must also rule on the motion of the defendants for a new trial. Mays v. Pioneer Lumber Corporation, 502 F. 2d 106 (1974).

The new trial motions of the defendants are based on the following grounds:

"1. The verdict is contrary to law.

"2. The verdict is contrary to the weight of the evidence.

"3. The verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence.

"4. The verdict in the sum of $175,000.00 is punitive in character and contrary to the court's rulings and instructions.



"5. This Honorable Court (committed errors) during the course of the trial..."

That the court deems the verdict contrary to law and against the weight of the evidence is, of course, apparent from the court's ruling on the motion for judgment n.o.v., but if on appeal this ruling of the court is held to be erroneous and that reasonable minds could in fact differ as to whether the conduct of the plaintiff on the occasion in question constituted contributory negligence as a matter of law, then it is not perceived that any useful purpose would be served by ordering a new trial on these same undisputed facts.

With respect to the question of damages the court is of opinion that in view of the severity and permanency of the plaintiff's injuries that the amount awarded was within reasonable limits, and there was nothing to indicate that

the jury was motivated by considerations of prejudice or passion. Certainly the verdict was not such as to shock the conscience of the court, and it will not be disturbed as excessive.

The court has carefully considered the errors alleged to have been committed by the court during the course of the trial but is of opinion that the objections, most of which are now made for the first time, are without merit and must therefore be overruled. The case was well tried by able counsel for all parties, and only the plaintiff registered any objections to the court's instructions to the jury. At this point there would appear to remain only one serious question of law for determination, that being the one decided herein on the question of contributory negligence, and if defendants prevail on this question on appeal, there will be no necessity for a new



trial; otherwise, there appears to be no substantial reason to believe that any different result would follow a new trial of the case before another jury.

For the reasons herein stated it is now

ORDERED:

1. That the motions of defendants for a new trial are denied;

2. That the motions of defendants for judgment notwithstanding the verdict are allowed; and

3. That the action be and the same is hereby dismissed.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

July 18, 1975.

APPENDIX B
(Judgment of the Court of Appeals
for the Fourth Circuit)

BUTZNER, Circuit Judge:

This is a negligence case. Eldred Moore was injured when he came in contact with a wire carrying 13,200 volts of electricity. Moore was a summer worker at Soul City, North Carolina, helping to build a new city. He was hurt while repairing the roof of a building so that it could be used as a dormitory.

The jury found that his injury resulted from the negligence of Carolina Power & Light Co., which owned and maintained the electric wire; Floyd B. McKissick Enterprises, which owned the building; and Soul City Foundation, Moore's employer. The district court granted the defendants' motions for judgment notwithstanding the verdict on the ground that Moore was contributorily negligent



as a matter of law. We reverse.

I

No one presented any evidence of how the accident happened. Moore could not remember what took place after he climbed onto the roof, and no one else saw what occurred.

The evidence showed that Moore and his supervisor climbed onto the southern side of the roof to repair it and that his supervisor told him to go to the northwest corner, where most of the damage was. There were two wires, clearly visible to the supervisor, running over the northern part of the building, one about eight inches and the other about four feet above the peak of the roof near the area where Moore was told to work. Only the higher of the two was charged with electricity. As the supervisor began his own work, he saw Moore walking along the top of the roof toward the

northern side. Less than five minutes later he saw the wire move, looked up, and saw Moore lying face down on the roof a few feet west of the peak. His body faced north and the wires were underneath him. There were burns on his chest, his left armpit, his left side, and his legs.

The defendants' theory of the case is that Moore walked into the wires because he did not see them. They say that failure to keep a proper lookout is negligence as a matter of law. It is, however, just as plausible to infer that Moore tried to stay safely away from the wires but remain close enough to do his work, and that he slipped on the slanted tin roof and fell over them. Or the jury might have decided that Moore reasonably assumed that the wires were not dangerous, because he testified that he did not recall being told that they



were live.

Thus, the jury could properly have drawn inferences that support Moore's denial of any negligence. Alternatively, the jury may have thought the inference that Moore was contributorily negligent and the inference that he was not were equally likely. In that case, too, it properly would have found for Moore, since the defendant has the burden of proving contributory negligence. See Fed. R. Civ. P. 8(c); King v. Bonardi, 267 N.C. 221, 228, 148 S.E.2d 32 (1966). Because the jury could reasonably draw the inferences necessary to the plaintiff's case or could reasonably find the plaintiff's and defendants' inferences equally likely, the court erred in granting judgment n.o.v. See Lavender v. Kurn, 327 U.S. 645, 652 (1946); Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061, 1066 (4th Cir. 1969).

II

McKissick Enterprises contends that even if Moore were not contributorily negligent, it should prevail because the district court erred in denying its motion for judgment n.o.v. on the ground that the evidence failed to establish its negligence. This argument lacks merit. A landowner must keep his buildings in reasonably safe condition and must warn business invitees like Moore of dangers that are not obvious. See Waters v. Harris, 250 N.C. 701, 704, 110 S.E.2d 283 (1959). The evidence showed that employees of McKissick Enterprises knew about the live wire, knew it was dangerous, and knew that inexperienced workers like Moore would be repairing the building. But they did nothing to remove the hazard or warn Moore of the danger. This evidence furnishes ample support for the jury's finding that it was negligent.



III

McKissick Enterprises assigns as error the court's failure to give its requested instructions on active and passive negligence and on intervening and insulating negligence. It believes that even if its negligence is proven, it was only passively negligent, while Soul City Foundation and Carolina Power & Light were actively negligent. McKissick Enterprises also argues that the negligent acts of the power company and Soul City were intervening causes of the accident. The power company makes similar arguments. Indeed, it goes further and contends that the evidence does not support the jury's finding that its negligence was a proximate cause of the accident.

We reject these contentions. The evidence supports the jury's conclusion that the power company's negligence in maintaining its wire only four feet above

the roof was a proximate cause of Moore's injuries.* Finally, passive negligence and intervening cause are defenses only if the active negligence or intervening cause if the "real, efficient" cause of the injury. See Powers v. Sternberg & Co., 213 N.C. 41, 43, 195 S.E. 88 (1938). Although the court did not use terms like active negligence and intervening cause, it adequately instructed the jury that it could not hold the property owner and the power company liable unless their negligence proximately caused the accident.

In Riddle v. Artis, 243 N.C. 668, 91 S.E. 2d 894 (1956), the court observed that since two or more proximate causes, originating from separate and distinct

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* A state law requires that power lines be kept eight feet above buildings. See Rule R8-26, North Carolina Utilities Commission, adopting U. S. Dept. of Commerce, Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines, at 69 (1966).



sources, may be responsible for an injury, an action may be brought against one or all of the wrongdoers. Continuing, the court said:

> "It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it." 243 N.C. at 671, 91 S.E.2d at 896.

The judgment of the district court is affirmed in part and reversed in part, and the jury's verdict is reinstated.